

# Poor Prospects for Internationalization: Germans and Americans in Law Faculties Jenseits des Atlantiks

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## Introduction

For all the noise it makes about internationalizing German legal scholarship, the Council's [Report](#) only makes a feeble pass at the deeply parochial culture that dominates the German legal academy. One of the gravest consequences of that parochialism is the exclusion of foreign legal scholars from Germany's law faculties. This, in turn, undermines other attempts at internationalizing German legal scholarship. I hope to illustrate the extent of this problem with a survey that shows how few American jurists are teaching in Germany and how many Germans have succeeded in becoming law professors in America.

## Globalizing Legal Education

The German Council of Science and Humanities correctly identifies the "Europeanization and internationalization" of the law as one of the most compelling forces affecting the "prospects of Legal scholarship in Germany." (11) This is almost so evident as to be banal. Germany, after all, recently passed the United Kingdom to become the [second largest share](#) of a market for legal services that long ago went global. But the law is a parochial institution and the state organs that promulgate and administer it are naturally and intensely jealous. The Council should be commended for placing such emphasis on the issue.

In a [globalized](#) market for higher education, the "intense competition in the field of science and higher education" requires German universities to redefine themselves "nationally and on a European scale." (11) In response to this the *Report* calls for the "formulation of a strategy to make German higher education institutions more international." (64)

## The *Report's* Inadequate Response to Parochialism in Faculty Recruitment

The *Report* does too little to promote the internationalization of Germany's academic personnel, a subject the *Report* refers to under the heading "Recruitment Practices in Legal Scholarship." This is a pity because it means that German legal scholarship risks suffering a double-loss. First, Germany will lose-out in the global competition for the best law teachers and researchers. Outstanding German talent is finding its way out of Germany and outstanding foreign talent is not finding its way into Germany as a dynamic offset to this [brain-drain](#). Second, German law schools will not have globally diverse faculties on hand to contribute the authentic, integrated and deep globalization of the curriculum the Council calls for in other respects. Non-

German-trained professors, fully assimilated into the life of German law faculties will be necessary to help students “encounter culturally different ways of thinking and theorizing the law.” (63)

The *Report* recognizes that the situation regarding foreign law teachers and researchers in Germany is dire. “When compared to other disciplines,” the *Report* explains, “the number of foreign professors appears particularly small.” (17) At least in the law faculties of German universities (excluding universities of applied sciences) non-German nationals constitute only 2.8% of law professors—divided between 1.9% EU nationals and 0.9% non-EU nationals (18 and 8 professors respectively). (91) This is four percentage points lower than in other fields.

If the number is small, at least the *Report* correctly identifies the nearly insurmountable, formal barriers to foreigners’ access to positions in German law faculties: success on the first state exam, specialization in the doctrinal German legal subjects that dominate the law school curriculum, and the publication of a habilitation. (45)

Others in this symposium [have already pointed out](#) that the *Report*’s proposed reforms are not likely to alleviate this problem. In fact, the Council shows no real resolve to open the German legal academy to foreigners. The *Report* urges the loosening of the demands associated with the habilitation. But this [most-German of all academic institutions](#) remains. And among the criteria it identifies as appropriate for the conferral of an academic qualification, high marks on the state exam still holds the place of pride. (49) The standards the *Report* hopes might guide the recruitment of law professors have a cosmopolitan veneer. A non-German scholar might satisfy most of them. But a closer reading suggests that the Council’s more-flexible criteria are innovations precisely because they are meant to cast the traditional *German-trained candidate* in a new register. They are not meant to clear a pathway for the recruitment of foreign legal scholars. This parochial bent is evident, for example, in the *Report*’s proposal that (German-trained) candidates be relieved of the obligation to demonstrate mastery of *all* sub-fields covered by an open chair. But mastery of *some* sub-fields of the relevant field of German law is implied. The *Report* also proposes that (German-trained) candidates should be rewarded for their global profile, including foreign degrees, participation in international legal discourse, and ties to international research networks. (50) These experiences and credentials matter only as a refinement or re-imagination of the traditional German-trained candidate. After all, a foreign scholar—simply by virtue of her foreign background and training—would possess these latter traits in a quality and degree that would be hard for a German-trained candidate to match. As if to emphasize the matter the *Report* urges German law faculties to open up a single ghettoized chair for appointment “irrespective of whether or not the candidate has taken the First Examination in Germany” so that a “foreign scholar [can] then be appointed.” (46)

The message in the *Report* is clear. German legal scholarship is to remain a German affair. Even the globalization of German legal scholarship, with a few token exceptions, will take the form of globally-adapting German-trained legal scholars. It is not a vision suited to the *Report*’s understanding of the newly global character of the law and higher education. With no sense of irony about the way in which it

entrenches the fact, the *Report* sorrowfully concludes that “the German system remains largely closed to foreigners.” (45) And so it will remain.

## Empirical Survey

I was curious what this meant for Americans in German legal scholarship. The statistics relied upon by the Council suggest that there are only eight non-EU nationals holding full-time faculty positions in the law faculties of German universities. On the basis of my review of the faculty bios posted on the websites of Germany’s law schools, it seems only two of them are American. Considering America’s rich legal history and the countries’ close business, security and social ties, it is not an impressive number. I identify these Americans in the table at footnote 1. <sup>[1]</sup>

Is it ironic, sad, or cynical that the *Report* recognizes that it works differently elsewhere, even while daring to propose so little in the way of change for Germany? With remarkable understatement the Council modestly remarks that “a number of Germans have had success abroad.” (45)

I was curious whether Germans had succeeded in the highly competitive market for law professors in the United States. Nearly [one thousand applicants](#) each year compete for positions at American law schools and only [1 out of 7 succeeds](#). There is no reason to assume that the American legal academy would be inherently more open to foreign scholars. First, the American legal culture should be at least as parochial as Germany’s. Second, training in German law (especially in light of its continental or codified orientation) does not prepare German émigrés to contribute to the common law core curriculum offered almost uniformly at American law schools. Finally, Germans should have little access to the traditional [formal and informal criteria](#) qualifying someone for a position as a law professor in the United States. How many Germans can claim to have served as the editor of one of America’s prestigious student-run law reviews (this would be a genuinely interesting—and not just rhetorical—topic for additional research), performed among the top students at one of America’s elite law schools, and served as a judicial clerk for a judge in the American federal courts (this also would be a genuinely interesting—and not just rhetorical—topic for additional research)?

Despite their seeming disadvantages (some view it as outright “[prejudice](#)” and call it the “foreigner barrier”), Germans are enjoying success as American law professors. It is difficult to get precise numbers. To identify German law faculty (either Germans with American-training or Germans largely trained in the “old country”) I was obliged to review the faculty bios posted on the websites of America’s 200-plus law schools. It was an imprecise and unsystematic survey that benefited a little from a similar effort, undertaken a few years ago, by [M.M. Siems](#). Any omissions are accidental. I hope readers will share the names of any additional Germans working in American law schools with me. Still, even if it was haphazard (likely producing an undercount), my effort produced some striking findings.

More than thirty Germans are making (or, until recently, have made) careers in American legal education. That number excludes the Canadians (there might be

quite a few of them) and all the others with national backgrounds and professional histories from outside America holding faculty positions in American law schools. These are only the Germans.

I divided them into two groups.

The first group consists of Germans who received their academic training in the United States. I might have excluded this group. Except for the “typical” disadvantages facing immigrants in America, it could be assumed that they had the same access as any American to the post-secondary education, graduate-level education, and professional experiences that are necessary for a career in American legal education. But I chose to include these American-trained Germans because there seems to be no parallel for this class among the Americans working in German law faculties. (See [footnote 1](#)). Münster’s Professor [Lundmark](#) is a hybrid case. He received his undergraduate (Bachelor) and primary legal training (Juris Doctor) in the United States before pursuing his Dr. jur. in Germany. Looking nothing like these “deep-cover” German immigrants, Professor [Larsen](#) at the Bucerius Law School took his degrees in the United States (Bachelor, Juris Doctor) and the United Kingdom (Masters). The Germans in this class are identified in the table at footnote 2. <sup>[2]</sup>

The second group includes Germans who received their basic academic training (excluding a non-German LL.M. or S.J.D.) in Germany and who have nevertheless made careers in American law schools. They are identified in the table at footnote 3. <sup>[3]</sup>

## Analysis

Does this data help illuminate the gross trade imbalance between Germany and the United States in this peculiar labor market? Are there additional conclusions about the inadequacy of the *Report’s* vision for the internationalization of German legal scholarship—especially as that involves the recruitment of non-German scholars—that we can draw on the basis of this comparison?

### *Insights from the Survey*

It is clear, for example, that in some cases the American legal academy was the beneficiary of emigration brought-on by Nazi persecution. This is most famously the case with respect to [Thomas Buergenthal](#). But it is also true for [Richard Buxbaum](#). I am not familiar enough with the biographies of the others in these lists to know whether they are representative of the historic cultural and intellectual windfall America enjoyed as a result of Nazi persecution or the deliberate effort to [lure German scientists to the United States after the war](#). The impact of that generation of German émigrés on American law has been thoughtfully considered by [Vivian Curran](#).

The previous point suggests the next. The flow of German legal scholars to America has been a consistent, multi-generational phenomenon. As some of the elders of this class of American legal scholars begin to pass away, it is clear that successive post-war generations of Germans have been building prominent American careers behind

them. Michigan's [Mathias Reimann](#) succeeded (after some years) Richard Buxbaum as the Editor-in-Chief of the *American Journal of Comparative Law*. Incidentally, a German émigré to Canada—McGill's [Helge Dedek](#)—has now followed Professor Reimann as the newest editor of the *American Journal of Comparative Law*.

Another conspicuous fact that emerges from the data is that the Germans have had remarkable success penetrating America's elite law faculties. Thirteen of the top-25 law schools (as ranked by [U.S. News and World Report](#)) have a German as a member of the faculty. New York University (ranked #6) and the University of Texas (ranked #15) have two Germans on the faculty. Unless I have overlooked someone, the outliers include: Yale, Chicago, Virginia, North Western, Cornell, Georgetown, UCLA, USC, Minnesota, Washington University, Alabama and Notre Dame. Yet, some of these law schools have Germans associated with the faculty in less permanent roles. This is true at Yale where [Dieter Grimm](#) has a recurring position in the spring term of each year as the "Visiting Professor of Law and Peter and Patricia Gruber Fellow in Global Justice." He has been joined this spring by [Peer Zumbansen](#) who will be a "Visiting Professor of Law."

But this is not only an elite law school phenomenon. Germans are having success across the spectrum of American law schools. They are on the faculties at large public universities (Penn State University or the University of Florida), successful local law schools (particularly the Catholic law schools at the Loyola Universities and St. Thomas Universities), and nationally respected private law schools (including Tulane and Washington & Lee). Two of the University of Miami's most recent faculty hires have been Germans.

Many of the Germans anchor a faculty's international and comparative law curriculum and programming. In this capacity Germans play a role similar to that envisioned by the Council for the proposed chair in German law faculties made available to foreign candidates. But many Germans are teaching courses in their law schools' regular, doctrinal curriculum. They are particularly well represented in corporate law ([Dammann](#), [Kaal](#), [Pistor](#), [Spamann](#)). But they also teach constitutional law ([Casper](#), [Kumm](#)). Germans have also served as administrators of American law schools and universities. [Nora Demleitner](#) is the Dean of Washington & Lee University School of Law. Gerhard Casper was the President of Stanford University.

### *Explanations*

Let me suggest only a few explanations for the success Germans have enjoyed in the American legal academy and the marked exclusion of Americans from German legal scholarship.

One possible explanation for the difference is that the respective legal cultures (roughly characterized as continental law and common law) have varying capacities for flexibility and the accommodation of difference. On one hand, this explanation would point to German *Rechtswissenschaft's* deductive, positivistic and highly systematic tradition. In its most stereotypical form, this approach to the law prioritizes the pursuit of a single, correct solution to legal problems. Codification, with its comprehensive and totalizing character, embodies this jurisprudence. These



tendencies in legal thinking, it might be argued, would devalue and marginalize difference in a way that is reflected by the general exclusion of foreign scholars (and especially American common law lawyers) from German law faculties. On the other hand, the common law's emphasis on factual distinctions, evolving and particularized law, induction and analogy might position American law schools to attract and integrate foreign legal scholars and their different views on the law.

Another explanation for the difference might be the liberalized American higher education market. Beyond its role as an important source of funding for public universities, the state plays a much more modest role in the administration of higher education in America than in Germany where universities are deeply embedded state institutions. The modest experiment in privatizing education in Germany has been [abandoned](#). Even when American law schools are part of state universities (this would include the prominent law schools at Berkeley, Michigan, Texas, Virginia and Cornell) their academic personnel do not become part of a formal, rigidly regulated, and highly exclusive civil service as they do in Germany. There is no equivalent of the *Beamtenstatus* in America. Of course, a number of American law schools are private. America's liberalized academic market contributes to the fact that American law professors may be better paid than their German counterparts. W3 Professors in Berlin, thought to be in the mid-range of the national salary scale, might earn \$150,000 per year ([Berlin's](#) W3 *Grundgehalt* of roughly €7,000/month plus €2,000/month in allowances). The value of their compensation is increased, however, by the fact that they are often exempted from some payroll taxes (retirement and unemployment insurance payments). American law professor [salaries](#) "range from \$113,691 to \$242,500 per year ... some salaries reach beyond \$300,000." The German Federal Constitutional Court recently ruled that the compensation of W2 professors in Hessen was [constitutionally inadequate](#). Economic incentive surely plays a role in this story.

A third explanation is that the criteria for entering the German legal academy—particularly the requirement that candidates write two publishable dissertations—have such objective value that they can easily be credited by prospective American employers as well. This claim, however, would have to account for the unique style and focus of the traditional German Ph.D. dissertation and habilitation, both of which are also usually written in German. While aspiring German legal scholars are writing their two books, their American counterparts are completing an undergraduate degree in a field not related to the law, making experiences as practicing lawyers, and clerking for a judge. These requirements for success in America seem not to be valued by German law faculties.

A fourth, deeper explanation might be linked to the two countries very different histories of immigration and cultural assimilation. Yet, this insight might have counterintuitive or conflicting impacts. On one hand, America has a richer and deeper tradition of immigration. But Americans are also infamously and stubbornly [monolingual](#). Even if courses at German law schools are increasingly being taught in English, the general lack of German-language proficiency is bound to discourage Americans from considering economic immigration to Germany. On the other hand, despite having only recently awakened to the fact that Germany is also

an “[immigration country](#),” Germans have higher-levels of bi- and multilingualism, including a respectable embrace of English (Germany’s 59% [English-proficiency rate](#) puts it in 14<sup>th</sup> place in Europe). English-language proficiency must make immigration to America seem somewhat less daunting for Germans.

It is also necessary to confront the possibility that the dissimilarity is a consequence of different degrees of chauvinism in the systems’ legal (or at least legal-academic) cultures. It would be provocative to suggest that America is the less chauvinistic of the two legal cultures, considering American law’s reputation for isolationism and “[exceptionalism](#).” Yet foreigners have been able to sit for the bar in [California](#) and [New York](#) on the basis of as little as a one-year LL.M. experience at an American law school. And often a single American graduate law degree (LL.M. or S.J.D.) has been enough to give foreign legal scholars the foothold they need to gain access to the American legal academy. Are there examples from Germany that suggest that the German legal culture is similarly open to and accommodating? My data points in another, more insular direction.

## Conclusion

If the Council was serious about internationalizing German legal scholarship in response to the globalization of the law and higher education, then it should have more aggressively tackled the barriers foreign scholars face in the German market for law faculty. This survey shows that German law faculties remain almost completely closed to Americans. In a dramatic contrast, Germans have made impressive careers in the American legal academy. There are many explanations for this and the *Report* neither seriously articulates nor addresses them. Worse still, the Council’s *Report* does little to disprove the least appealing possibility—that the German legal academy is hidebound and protectionist.

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[1] I have not deliberately neglected any Americans currently working (or who have in the past worked) in German legal scholarship. If I have overlooked someone, I would welcome that information.

<b>Table One – Americans in German Law Faculties</b>	
<a href="#">Professor Clifford Larsen</a> UBS Professor of Law & Dean for the Master of Law and Business Program	Bucerius Law School
<a href="#">Prof. Dr. Thomas Lundmark</a> Chair for Common Law and Comparative Legal Theory	University of Münster

[2]

<b>Table Two – Germans Trained in America</b>
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<a href="#">Thomas Buergenthal</a> Lobingier Professor of Comparative Law and Jurisprudence	George Washington University Law School
<a href="#">Richard Buxbaum</a> Jackson H. Ralston Professor of International Law (Emeritus)	Berkeley Law – University of California
<a href="#">Nora Demleitner</a> Dean & Roy L. Steinheimer, Jr. Professor of Law	Washington & Lee University School of Law
<a href="#">Markus Dubber</a> Professor	SUNY Buffalo School of Law (1993-2007) University of Toronto Faculty of Law (2007-present)
<a href="#">Peter Hay</a> L.Q.C. Lamar Professor Emeritus of Law	Emory University Law School
<a href="#">Wulf Kaal</a> Associate Professor	University of St. Thomas (Mn.) School of Law
<a href="#">David Kader</a> Professor of Law	Arizona State University Sandra Day O'Connor College of Law
<a href="#">Thomas Mauet</a> Milton O. Riepe Professor & Director of Trial Advocacy	University of Arizona James E. Rogers College of Law
<a href="#">Ingrid Bunk Wuerth</a> Professor of Law & Director, International Legal Studies Program	Vanderbilt Law School

[3]

<b>Table Three – German-Trained Scholars</b>	
<a href="#">Insa Blanke</a> Executive Director, Foreign and International LL.M. Programs	Loyola University Chicago School of Law
<a href="#">Jutta Renate Brunnee</a> Professor of Law and Metcalf Chair in Environmental Law & Associate Dean of Law (Graduate)	New York University School of Law
<a href="#">Gerhard Casper</a> Professor of Law (Emeritus) & President (Emeritus) Peter and Helen Bing Professor in Undergraduate Education (Emeritus)  Senior Fellow at the Freeman Spogli Institute for International Studies	Stanford Law School
<a href="#">Jost Delbrück</a> Professor of Law (Emeritus)	Indiana University (Bloomington) Maurer School of Law
<a href="#">Jens C. Dammann</a> William Stamps Farish Professor in Law	University of Texas (Austin) School of Law
<a href="#">Frank Emmert</a> John S. Grimes Professor of Law & Executive Director, Center for International and Comparative Law	Indiana University (Indianapolis) Robert H. McKinney School of Law



<a href="#">Jörg Fedtke</a> A.N. Yiannopoulos Professor in Comparative Law & Co-Director, Eason-Weinmann Center for Comparative Law Co-Director, Berlin Program for Intercultural Negotiation and Mediation	Tulane University Law School
<a href="#">Christoph Henkel</a> Associate Professor of Law	Mississippi College School of Law
<a href="#">Friedrich K. Kubler</a> (d. 2013) Professor of Law	University of Pennsylvania Law School
<a href="#">Mattias Kumm</a> Inge Rennert Professor of Law	New York University School of Law
<a href="#">Inga Markovits</a> “The Friends of Joe Jamail” Regents Chair	University of Texas (Austin) School of Law
<a href="#">Ralf Michaels</a> Arthur Larson Professor of Law	Duke University Law School
<a href="#">Felix Mormann</a> Associate Professor of Law	University of Miami School of Law
<a href="#">Katharina Pistor</a> Michael I. Sovern Professor of Law	Columbia University Law School
<a href="#">Markus G. Puder</a> Associate Professor of Law	Loyola University New Orleans College of Law
<a href="#">Mathias Reimann</a> Hessel E. Yntema Professor of Law	University of Michigan Law School
<a href="#">Caroline Sheldon</a> Director, Graduate and International Programs	Pennsylvania State University Dickinson School of Law
<a href="#">Holger Spamann</a> Assistant Professor of Law	Harvard University Law School
<a href="#">Barbara van Schewick</a> Associate Professor of Law & Helen L. Crocker Faculty Scholar	Stanford University Law School
<a href="#">Markus Wagner</a> Associate Professor of Law	University of Miami School of Law
<a href="#">Walter Weyrauch</a> (d. 2007) Distinguished Professor and Steven C. O’Connell Chair	University of Florida Levin College of Law
<a href="#">Siegfried Wiessner</a> Professor of Law & Founder & Director, LL.M. / J.S.D. Program in Intercultural Human Rights	St. Thomas University (Fla.) School of Law